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No. 96-1570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NYNEX CORPORATION,
NYNEX MATERIEL ENTERPRISES COMPANY,
AND NEW YORK TELEPHONE COMPANY,
Petitioners,

v.

DISCON INCORPORATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Business Roundtable respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of both parties has been requested. Counsel for petitioners has consented in writing; counsel for respondent has consented orally but written confirmation has not been received.

The companies represented in the Roundtable are engaged in a wide variety of businesses and are subject to a wide variety of government regulations, including the antitrust laws. They do not condone violations of government regulations by fellow members or by others, but they also believe it is harmful to apply regulatory remedies and penalties in areas where they do not belong. Specifically, the Roundtable members believe it is harmful to apply the

antitrust laws to claims of fraudulent conduct which—however reprehensible—does not involve harm to the competitive process.

It is evident from petitioners' brief, which asked this Court to review the decision below, that the lower court failed to appreciate the distinction between standards of proof applied to horizontal agreements and those applied to vertical agreements. The former may be subject to *per se* condemnation; the latter are normally judged under the rule of reason. The distinction is critical in this case because the plaintiff-respondent has not pleaded competitive harm.

Petitioners will understandably emphasize this infirmity in the decision below because this Court has spoken so clearly on the subject and because the Department of Justice and the Federal Trade Commission apparently agree that this aspect of the decision is wrong.* The members of The Business Roundtable are concerned about this horizontal/vertical issue, but are even more concerned about a different aspect of the opinion.

The decision below permits plaintiff-respondent to make an antitrust case out of what is nothing more than a claim of regulatory fraud—namely, a scheme by which a cost-plus regulated utility artificially inflated its costs. Even if the conduct caused harm to consumers, however, it is not harm that flows from injury to the competitive process. It is harm appropriately addressed in a different proceeding.

If the lower court's decision is upheld, it could have consequences that extend well beyond the world of cost-plus utility regulation. There are a wide variety of regulatory offenses that could be transmuted into antitrust cases under the theories adopted below and apparently endorsed by the Department of Justice and the Federal Trade Commission.

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* Brief for the United States and the Federal Trade Commission as Amicus Curiae On Petition For a Writ of Certiorari at 14.

Because The Business Roundtable has a diverse membership, and because none of its members are directly involved in the case before the Court (Petitioner NYNEX Corporation was a member of The Business Roundtable until August 1997), it can provide a different perspective on this issue of whether the antitrust laws are misapplied. For this reason, The Business Roundtable requests that the following brief in support of petitioners be accepted for filing.

Respectfully submitted,

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BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Business Roundtable is an association of about 200 chief executive officers of leading U.S. corporations, employing over 10 million people.[1] These members examine policy issues that affect the economy and develop positions which they believe will promote the general welfare through application of sound economic and social principles.

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, *amicus* states that no counsel for a party has authored any part of this brief, and no person or entity, other than the *amicus*, its members or its counsel, made any monetary contribution to the preparation or submission of this brief.

The companies represented in the Roundtable are engaged in a wide variety of businesses and are subject to a wide variety of government laws and regulations, including the antitrust laws. They do not condone violations of the law by fellow members or by others, but they also believe it is harmful to apply legal remedies and penalties in areas where they do not belong. Specifically, the Roundtable members believe it is harmful to apply the antitrust laws to claims of fraudulent conduct which—however reprehensible—does not involve harm to the competitive process.

This amicus brief will therefore emphasize a point that has not been emphasized in the briefs previously filed; namely, that this case involves a claim of regulatory fraud disguised as an antitrust case.

SUMMARY OF ARGUMENT

The petitioners and the amici that argued in favor of review by this Court have shown that the court below failed to appreciate the distinction between standards of proof applied to horizontal agreements and those applied to vertical agreements. The lower court did not apply the rule in *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988), which held that non-price vertical agreements must be analyzed under the rule of reason, not a rule of *per se* illegality.

The threshold question under the rule of reason is whether there is a plausible claim of harm to competition (as opposed to harm to an individual competitor). The lower court did not require plaintiff-respondent to plead competitive harm, but instead seemed to require that the defendant-petitioner affirmatively justify a decision to change suppliers. The court thus sustained what is nominally an antitrust claim, but which is really a claim of regulatory fraud that could be addressed in another appropriate forum.

Antitrust remedies should not be used to supplant other regulatory schemes. There are many activities that harm competitors, or even consumers, which do not implicate the antitrust laws because they do not harm the competitive process. Misapplication of the antitrust remedies imposes unwarranted burdens on economic activity and leads to distortion and confusion in the development of substantive antitrust law.

ARGUMENT

I. THE LOWER COURT'S FAILURE TO APPLY *SHARP* HAS TRANSMUTED A FRAUD CLAIM INTO AN ANTITRUST CASE.

The lower court's opinion has blurred the fundamental distinction between horizontal and vertical agreements, contrary to the clear direction of this Court in *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988). It failed to apply *Sharp*'s unambiguous holding that the rule of reason, not the *per se* rule, is properly applied to non-price vertical restraints. The lower court said:

> We do not decide at this point whether the District Court on remand should apply a *per se* rule . . . .[2]

The distinction is critical here, as in many other cases, because respondent has not pleaded facts that show injury to competition, and therefore has no viable case under the rule of reason. *See Electronics Communications Corp. v. Toshiba Am. Consumer Prods, Inc.*, 129 F.3d 240, 244 (2d Cir. 1997) (termination of a distributor is not "a violation of the antitrust laws, without a showing of an actual adverse effect on competition market-wide . . .").

It is well-established that under the rule of reason, the plaintiff bears the burden of proving that a restraint has

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[2] Pet. App. 13a n.6.

a substantial anticompetitive effect,[3] and that absent such an effect the defendant need not offer or prove justifications for its conduct.[4] Thus, the lower court initially made not one, but three fundamental errors in this case: it failed to rule out application of the *per se* rule to a type of conduct that this Court has held should not be viewed as *per se* illegal; it failed to require the respondent to meet its threshold burden under the rule of reason of pleading facts that show a substantial anticompetitive effect from the challenged conduct; and it assumed that the absence of a procompetitive motive for the challenged conduct could by itself cure the deficiency in respondent's proof.

Sharp declined to apply the *per se* rule to an agreement between a manufacturer and a dealer to terminate another discounting dealer and reaffirmed the fundamental principle that the *per se* rule is reserved for agreements that are so inherently anticompetitive that they "would always or almost always tend to restrict competition and decrease output." *Sharp*, 485 U.S. at 723 (citation omitted). The Court observed that its:

> approach to the question presented in the present case is guided by the premises of *GTE Sylvania* and *Monsanto*: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by *demonstrable economic effect, such as the facilitation of cartelizing, rather*

[3] *Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931); *see generally* AMERICAN BAR ASS'N, ANTITRUST LAW DEVELOPMENTS (FOURTH) 55 n.287 (1997) (cases cited therein).

[4] *See* ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 3, at 55 n.288; *see also, e.g., Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 547 (2d Cir.), *cert. denied*, 510 U.S. 947 (1993); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993); *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

> *than formalistic distinctions*; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*.

Id. at 726 (emphasis added).

Because the lower court failed to apply the clear message of the *Sharp* case, it allowed respondent to transmute a fraud claim into an antitrust case.

This point emerges clearly when the case is stripped down to its essentials. NYNEX and its wholly-owned subsidiaries New York Telephone Company, a regulated provider of telephone services, and NYNEX Materiel Enterprises, an agent which purchased services for the telephone company, are accused of a conspiracy to avoid rate regulation. Under this scheme, the regulated seller of telephone services was able to inflate its cost basis artifically because one of its suppliers agreed to falsify the real transaction prices on invoices and later pay a secret rebate. It is asserted that the offending defendants discontinued respondent Discon as a supplier because it would not go along with the scheme.

The mere substitution of one competitor for another in the supply of services to the telephone company is not a matter of competitive concern, standing alone. The lower court recognized that: "[i]n the vast majority of cases, the decision to discriminate in favor of one supplier over another will have a pro-competitive intent and effect." Pet. App. 12a (*citing Sharp*, 485 U.S. at 724-25). The opinion goes on to say, however, that "no such procompetitive rationale appears on the face of the complaint," and accordingly holds that the complaint states a cause of action. *Id.* at 12a-13a. The court apparently misreads *Sharp* to suggest that a defendant customer bears some affirmative burden of showing that there

is a pro-competitive reason for its decision to deal with one supplier rather than another.[5]

This is simply wrong. Under the antitrust laws, a customer is normally free to deal with whomever it pleases, for good reasons or for bad. *Cf. United States v. Colgate & Co.*, 250 U.S. 300 (1919). It is only when a rejected supplier can show some harm to competition in a relevant market (not just harm to itself) that an antitrust inquiry may appropriately consider the reasons for the supplier selection. And improper objectives will not support an antitrust claim unless they involve an attempt to suppress competition—for example, by fixing resale prices. *See Sharp*, 485 U.S. at 735. It is not enough simply to show an intent to violate some other legal or moral imperative. This Court observed in one of its more recent antitrust decisions: "It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in original). The Court pointed out that:

> Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."

Id. at 225 (citation omitted).

[5] The lower court's mistaken allocation of burden was undoubtedly influenced by its failure to appreciate the significance of the distinction between horizontal and vertical arrangements, which was clearly articulated by this Court in *Sharp*. The opinion cites a number of pre-*Sharp* cases for the proposition that a purchase agreement between a customer and a single supplier can be characterized as a "group boycott" of the excluded supplier. Pet. App. 10a-12a. This fundamental mistake has, however, been adequately highlighted in the briefs of petitioners and others, and there is no need to repeat the arguments here.

If antitrust law prohibited supplier selections prompted by corruption, as claimed by the lower court, it could with equal logic prohibit supplier selections prompted by misrepresentation,[6] by commercial bribery,[7] by unlawful prejudice, or by supplier willingness to give customer's convenience a higher priority than compliance with burdensome safety or environmental regulations. Antitrust law could swallow every other area of government regulation. This unwarranted expansion of the antitrust laws does not affect only rate-regulated utilities; it could potentially apply to a broad range of business enterprises.

The brief in opposition to certiorari filed by the United States and the Federal Trade Commission ("DOJ/FTC Brief")[8] attempts to support the result below by a different line of reasoning than that of the lower court. In its discussion of the Sherman Act section 2 issue, this brief asserts that the complaint could be properly upheld if read to allege that "petitioners intended to assist AT&T [the cooperating supplier of removal services] in securing monopoly power." *Id.* at 18. This is true, in abstract legal theory. However, the DOJ/FTC Brief does not explain

[6] *Cf. Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 655 (7th Cir. 1984) (Posner, J.) ("[U]nfair competition, as such, does not violate the antitrust laws.") (citation omitted).

[7] *See, e.g., Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794 (7th Cir. 1961), in which the court dismissed Sherman Act claims by a firm that lost business to competitors who allegedly bribed a public official to award the contract to them: "[T]he use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law . . . . The antitrust laws were never meant to be a panacea for all wrongs." *Id.* at 804, *cert. denied*, 368 U.S. 944 (1961).

[8] Brief for the United States and the Federal Trade Commission as Amicus Curiae On Petition For a Writ of Certiorari.

how it could possibly be in respondent's interest to confer monopoly power on a supplier or, indeed, why it would be necessary for respondent to exclude plaintiff from the market entirely, when it surely could simply direct its agents to buy exclusively from AT&T. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986) (an economically irrational argument "makes no practical sense").

The DOJ/FTC Brief does contain a discussion of why a regulated monopolist may choose to pay a higher price to a supplier which will "assist it in evading regulation." DOJ/FTC Brief at 10. This argument simply recognizes that a corrupt buyer may need to share the fruits of the fraud with its corrupt supplier, but the buyer still has no rational incentive to reward the supplier with monopoly profits as well. For one thing, a monopoly supplier would presumably be better able to resist payment of the "secret year-end 'rebate'" that AT&T supposedly paid to petitioner. Pet. App. 5a.

There also is no valid claim of competitive injury in the market for telephone services. Any overcharges paid by consumers in the market for telephone services arose not from competitive activity (termination of one supplier in favor of another) but from the fraudulent inflation of the telephone company's real costs. The effect on consumers would have been exactly the same if NYNEX had been able to get its original supplier Discon to cooperate in the fraudulent scheme, and it would then have been even more obvious that there is no plausible nexus to the antitrust laws.

The lower court makes no effort to explain how there could be a harmful effect in the market for telephone services. The DOJ/FTC Brief says that an agreement violates the Sherman Act section 1 when it "has the purpose and effect of enabling the monopolist to evade regulatory scrutiny *and exercise market power in a downstream market*." DOJ/FTC Brief at 12 (emphasis added).

But the DOJ/FTC Brief does not explain how the agreement in issue could possibly enable defendant to exercise market power in a downstream market—other than in a purely semantic sense. If evasion of regulatory oversight by artificial inflation of invoices can be said to facilitate the "exercise of monopoly power," so could the payment of bribes to regulators or any other falsification of books and records. Under the theory of the DOJ/FTC Brief, these should be antitrust offenses as well.[9] Again, the antitrust laws invade other areas of regulation.

This anomaly is highlighted by Respondent's Brief in Opposition which claims with satisfaction that defendant's scheme "has been adjudicated [in a rate proceeding] to have led to massive inefficiencies and harm to consumers," and that millions of dollars in rate reductions and rebates have been allowed. Brief of Respondent In Opposition to Petition For a Writ of Certiorari at 3. Since plaintiff-respondent has no standing to assert a claim for any injury to competition in the market for telephone services other than in its capacity as a consumer of these services, and since such consumers have apparently already obtained relief in the appropriate forum, it is hard to see what role antitrust has to play. *See* Pet. App. 32a (district court opinion holding that plaintiff's attempt to state a Sherman Act section 1 claim based on its standing as a ratepayer is barred by the filed rate doctrine).

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[9] It is true that evasion of price regulation may provide a plausible motivation for tying arrangements, reciprocity or "cross subsidization" between different product lines, and these kinds of conduct can be legitimate matters of antitrust concern if competitive injury is proved. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 375-76 (1978). This motivation may therefore help an antitrust plaintiff counter arguments that the claimed conduct is inherently incredible or, alternatively, that the conduct is efficient and procompetitive. But, it is not the regulatory evasion that causes the competitive harm, if any; the plaintiff must prove harm from the conduct employed to implement the evasion.

In summary, the complaint pleads a serious fraud—and this brief does not, of course, defend the kind of conduct that is pleaded—but this is not an antitrust case.

II. IT IS BAD POLICY TO DISTORT ANTITRUST RULES IN ORDER TO PROVIDE REMEDIES AGAINST CONDUCT THAT IS OFFENSIVE FOR ANOTHER REASON.

It is evident from the face of the pleadings that regulatory remedies were available to remedy the wrongful evasion of telephone rate regulation that is asserted here. As stated in IX PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1712d, at 143 (1991):

> [T]he special remedy of treble damages was not created by Congress to enforce state or federal price ceilings. The appropriate damage and criminal remedies for violating a regulation are determined by the regulatory statute alone.

Judge Bork concurs in this analysis:

> Each body of law has its own purposes and its own scale of remedies and punishments. It is important to the integrity of the law that the wrongdoer not be convicted under any law that just happens to be handy, when his conduct does not in any way contravene the goals and rationale of that law.

ROBERT H. BORK, THE ANTITRUST PARADOX 381. Invocation of the antitrust laws here is not only unnecessary, but affirmatively harmful.

In recent years, this Court has been sensitive to the distortions in the legal system and in the economy that can arise from misapplication of antitrust remedies. It has attempted to avoid these harmful side effects by standing limitations, by evidentiary rules and by substantive doctrine. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court held that indirect purchasers did not have standing to recover damages under section 4 of the Clayton Act, noting that to rule otherwise would make cases unmanageable and increase the risk of duplicative

recoveries.[10] *Id.* at 740 (to allow indirect purchasers to recover damages would transform treble damage actions "into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant").[11] Concern about possible economic distortions are reflected in the rulings in *Matsushita*, 475 U.S. at 594 ("[M]istaken inferences [regarding business behavior] . . . are especially costly because they chill the very conduct the antitrust laws are designed to protect."), and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) ("[p]ermitting an agreement to be inferred merely from the existence of complaints . . . could defer or penalize perfectly legitimate conduct"). These same concerns were evident in *Sharp*, 485 U.S. at 728 (application of the *per se* rule to vertical non-price restraints could cause manufacturers to forego legitimate and competitively useful conduct).

An earlier tying decision, *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495 (1969) (*Fortner I*), illustrates the problems this Court has since been careful to avoid. A developer claimed he could only qualify for the uniquely favorable financing terms offered by U.S. Steel if he agreed to buy U.S. Steel's inferior prefabricated houses. The tying "product" was thus the seller's extension of credit on its own houses! In *Fortner I*, this Court allowed the plaintiff to transmute what should have been a breach of warranty claim into an antitrust case. The decision was followed by the strange spectacle of a plaintiff supporting his antitrust claim at trial with evidence

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[10] There could well be problems involving standing, duplicative recovery and the filed rate doctrine in the present case if respondent Discon has been, or will be, reimbursed for telephone service overcharges.

[11] Limitations on standing to avoid economic distortion also may be found in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977), and *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986).

that the defendant had been particularly generous when extending him credit.[12]

When the case came back, in *Fortner II*,[13] the Court attempted to remedy manifest injustice in the case at hand by finding that the defendant U.S. Steel had no particular advantage in providing credit, but its previous ruling constrained the Court from revisiting the basic question of whether antitrust law should have been invoked in the first place. Tying law remained confused until *Jefferson Parish* was decided in 1984.[14]

Dealer termination cases provide another notorious example of contract disputes that are sometimes artificially crammed into an antitrust mold. Familiar principles of contract law, and special statutes requiring a manufacturer to deal in "good faith,"[15] are designed to redress perceived imbalances in bargaining power between dealers and their suppliers. Antitrust remedies are much more attractive, however, and therefore dealers are alert for any communications that may suggest a possible anti-competitive motivation for a termination that is essentially grounded on business differences.[16] An extreme instance is *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir. 1986), where a single inconclu-

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[12] Counsel of Record on this brief participated in that trial as one of the lawyers for defendant U.S. Steel.

[13] *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977).

[14] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

[15] *E.g.*, Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221(e).

[16] Antitrust litigation over termination of a dealer is much more common than litigation over termination of a supplier, which is involved here, not because there is necessarily a greater potential for competitive harm, but because dealers may be dependent on the relationship more frequently than suppliers are.

sive communication in 1980 was used to create an antitrust case out of a business dipute dating back to 1969.[17]

The present controversy also is not a legitimate antitrust case. As this Court has repeatedly emphasized in recent years, the antitrust laws should only be applied to conduct that genuinely threatens harm to the competitive process.

III. AFFIRMANCE OF THE DECISION BELOW HAS THE POTENTIAL TO CREATE SERIOUS CONFUSION AND DISTORTION.

The DOJ/FTC Brief concedes "that certain language in the court's opinion was not well-chosen." DOJ/FTC Brief at 6. Specifically, the DOJ/FTC Brief refers to the lower court's mistaken use of the term "group boycott" to characterize a situation where a buyer replaces one supplier with another. *Id.* The terminology is important because, as the DOJ/FTC Brief also recognizes, group boycotts have traditionally been deemed illegal *per se*, "without any further inquiry into . . . anticompetitive effects or procompetitive justification." *Id.* at 13.

The DOJ/FTC Brief attempts to minimize the significance of the lower court's mistake, however, by arguing that "this case turned on its particular facts and does not state any general rule. . . ." *Id.* at 6. The brief further claims that even though the lower court has used the terms "group boycott" and "*per se*" rule in a way that is "at odds with this Court's decisions," *id.* at 15, the error is not significant because the district court still has the opportunity to clear up the confusion.

> It is thus unclear whether the district court's inquiry on remand will differ significantly from traditional rule of reason analysis.

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[17] Compare the straightforward approach of the court in *Colsa Corp. v. Martin Marietta Servs., Inc.*, 133 F.2d 853 (11th Cir. 1998), when a terminated subcontractor attempted to invoke the antitrust laws by claiming the prime contractor monopolized its own contract: "Any rights that Colsa may have against Martin Marietta sound in contract instead of antitrust law." *Id.* at 856.

Id. at 16. Now that this Court has accepted the case for review, presumably the DOJ and the FTC would agree, at the very least, that the Court should specifically repudiate the lower court's idiosyncratic rationale.

But, as shown above, the lower court's decision is wrong for an even more fundamental reason: it does not plead a credible scenario of injury to competition. This infirmity is present not only in the opinion below, but also in the restatement of the court's holding offered by the DOJ/FTC Brief. Contrary to the principles expressly articulated by this Court in *Matsushita*, 475 U.S. at 587, the reasoning of the DOJ/FTC Brief necessarily suggests that courts may accept bare allegations of competitive harm at their face value, regardless of whether they make any economic sense.

In *Sharp*, 485 U.S. 717, this Court also rejected a plaintiff's attempt to avoid substantive requirements simply by pleading a *per se* offense. *Sharp* involved a claim that a discounting distributor had been terminated at the behest of another distributor, who was upset by plaintiff's price competition. However, the competitive effect of that action, standing alone, was no worse than the effect of an exclusive dealing arrangement—which, of course, should be analyzed under the rule of reason.

The Court was not misled by the assertion that the manufacturer's response to a price-related complaint was equivalent to vertical price fixing. It looked to basic economic reality, rather than characterizations in the pleadings, and insisted on proof of an effect beyond the mere substitution of one dealer for another.[18]

Respondent here, given ample opportunity, has been unable even to plead facts that show competitive harm. This infirmity would, of course, become even more ap-

[18] In *Sharp*, the complaint could not be summarily dismissed because there was some additional evidence of a genuine price-fixing agreement. *Id.* at 721.

parent in the course of a trial if the decision below were allowed to stand. But an antitrust defendant will derive scant comfort from the prospect of ultimate vindication after protracted pretrial proceedings and a possible trial. The threat of litigation costs, standing alone, can significantly deter pro-competitive behavior.

Antitrust "regulation" differs from some other kinds of regulation in that over-deterrence is particularly likely to do affirmative harm. To be sure, over-compliance with regulations of any kind may result in additional costs. But, over-deterrence in the antitrust area has the additional effect of chilling the continuous adjustments demanded by a competitive economy. In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), this Court warned against "overdeterrence," which could cause businesses "to be excessively cautious in the face of uncertainty," *id.* at 441, and elaborated on the distinction between antitrust and other forms of regulation:

> [W]here the conduct prescribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose.

Id. at 442 n.17 (citation omitted).

Unduly broad definitions of "predatory pricing" will inhibit aggressive, pro-consumer price competition. Similarly, undue expansion of antitrust remedies of the kind involved here can inhibit flexibility in the selection of suppliers or dealers. The precise conduct pleaded here may be rare. But if the decision below is affirmed, any other supplier or dealer could state a viable antitrust case simply by pleading that it had been terminated for an un-

worthy reason, without any plausible showing of injury to competition. If terminated suppliers or dealers can require a defendant to justify its actions simply by pleading that the process was corrupt or by pleading conclusory injuries to competition, contrary to economic common sense, courts and litigants will be burdened and the economy will become more rigid and less responsive to consumers.

CONCLUSION

This Court should reverse the judgment of the Second Circuit.

Respectfully submitted,

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